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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 171

THE UNITED STATES, PETITIONER

v.

JEFFERSON ELECTRIC MANUFACTURING COMPANY

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court below on demurrer (R. 12–14) is reported in 69 C.Cls. 150. The opinion of the court below on the merits (R. 19–20) is reported in 2 F.Supp. 778.

JURISDICTION

The judgment below was entered on March 13, 1933. (R. 20.) The petition for a writ of certiorari was filed June 13, 1933, and was granted October 9, 1933. (R. 21.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the respondent may recover manufacturers' excise tax paid under the provisions of Section 900 of the Revenue Acts of 1918 and 1921, and Section 600 of the Revenue Act of 1924, when it did not prove that such taxes were not collected directly or indirectly from its customers, or, if so collected, had been returned to them, as provided in Section 424 of the Revenue Act of 1928.

2. Whether under Section 424 of the Revenue Act of 1928 the court below had jurisdiction to enter a judgment for the refund of manufacturers' excise taxes when it appeared that it was not established to the satisfaction of the Commissioner of Internal Revenue that the taxes had not been collected directly or indirectly from the respondent's customers, or that the taxes had been returned to the respondent's customers.

3. Whether the Court of Claims followed permissible practice in making an ultimate finding of fact that the ignition coils manufactured and sold by the respondent were not primarily adapted or specially designed for use in automobiles, motorcycles, automobile trucks or automobile wagons within the meaning of the applicable taxing statutes.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, pp. 26–28.

STATEMENT

The findings of the Court of Claims may be summarized as follows:

During the period beginning June 20, 1919, and ending April 21, 1926, the respondent paid excise taxes aggregating $67,544.87 on ignition coils which it manufactured and sold. (R. 16.)

Ignition coils were in use before the advent of the automobile, being used for stationary internal-combustion engines, and also for motorcycles and marine works. (R. 19.) They were not specially designed for automobiles and were first generally used for that purpose about the year 1914. (R. 19.)

The respondent sold its ignition coils involved in this suit for the most part to jobbers and distributors and did not know for what special purpose the coils were to be used. (R. 19.) Some of the coils were sold to manufacturers, wholesalers, mail-order houses and dealers but none were sold for original equipment. (R. 19.) The adaptability of ignition coils for various engines did not depend upon the internal construction of the coil. (R. 19.) The respondent manufactured 15 or 20 different kinds of ignition coils. (R. 19.)

The respondent's ignition coils were equally adapted to marine, automotive, tractor, truck, motorcycle, or airplane engines and to outboard motors and engines for concrete mixers and were not primarily adapted or specially designed for use as

a component of automobiles, motorcycles, automobile trucks, or automobile wagons. (R. 19.)[1]

Beginning May 19, 1923, and up to December 29, 1925, it was the respondent's practice to note on its invoices to customers that 1/21 of the amount paid by customers represented the 5 percent excise tax and that 20/21 indicated the purchase price. (R. 18.) During that part of this period when a 2½ percent rate was applicable the notations were 1/41 and 40/41. (R. 18.) It is not possible from the state of the record to determine the amount of excise tax paid for the period when the respondent made the above notations on its invoices sent customers. (R. 18.) At no time were the respondent's catalogue prices increased or decreased by reason of the imposition of the excise tax. (R. 18.) Prior to the period when the respondent noted its invoices as indicated above, the respondent did not add any amounts to the catalogue prices and did not collect any amounts additional to the catalogue prices because of the excise taxes. (R. 18.) The catalogue prices collected were transferred to the respondent's general ledger account without any separation into various elements, but the excise tax was set up in an additional account called "Excise Tax Expense." (R. 18.)

On May 28, 1923, the respondent filed a claim for refund of excise taxes paid for the period begin-

[1] To this finding the Government has made certain objections, which appear in Point III of this brief, *infra*, pp. 21–24.

ning March, 1919, and ending March, 1923, in the amount of $48,080.83. (R. 17.) After having once rejected the claim in full, the Commissioner of Internal Revenue, on or about November 28, 1928, allowed the claim in the amount of $46,758.53 and rejected it to the extent of $1,322.30 on the ground that the latter amount represented tax passed on to the respondent's customers. (R. 17.)

On March 25, 1925, the respondent filed a claim for refund of excise taxes for the period April, 1923, through December, 1924, in the amount of $15,363.79. (R. 17.) After having first rejected the claim in full the Commissioner of Internal Revenue, on or about November 30, 1928, allowed the claim in the amount of $768.76 and rejected it in the amount of $14,966.17 on the ground that the latter amount had been passed on to the respondent's customers and that the respondent had not filed the required bond. (R. 17.)

On September 15, 1926, the respondent filed a claim for refund of excise taxes for the period January, 1925, through February, 1926, for the amount of $5,051.41. (R. 17.) On November 22, 1928, the Commissioner rejected this claim for refund on the ground that the amount claimed represented taxes passed on to the respondent's customers and that the respondent had not submitted the specified bond. (R. 17.)

The respondent brought this suit March 25, 1929 (R. 1) to recover the sum of $20,017.58, with in-

terest, and the defendant counterclaimed for the amount of the refunds already paid, namely, $47,527.29, plus $21,737.37 interest. (R. 18.)

After having overruled a demurrer to the petition (R. 14) the Court of Claims gave judgment for the respondent in the sum of $20,017.58, and dismissed the counterclaim. (R. 21.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the respondent was entitled to recover manufacturers' excise taxes paid under Section 900 of the Revenue Acts of 1918 and 1921, and Section 600 of the Revenue Act of 1924, when the respondent had not proved that said taxes were not collected directly or indirectly from respondent's customers or, if so collected, that they were returned to respondent's customers.

2. In holding that the court had jurisdiction to give judgment for the respondent, although it affirmatively appeared that respondent had not established its right to a refund to the satisfaction of the Commissioner of Internal Revenue as provided in Section 424 of the Revenue Act of 1928.

3. In finding that respondent's ignition coils were not primarily adapted or specially designed for use in automobiles, motorcycles, automobile trucks, or automobile wagons.

4. In dismissing the petitioner's counterclaim and giving judgment for respondent.

SUMMARY OF ARGUMENT

I

In enacting Section 424(a)(2) of the Revenue Act of 1928 (*infra*, pp. 27–28), Congress intended to prevent the unjust enrichment of manufacturers who had passed automobile parts and accessories excise taxes on to their customers, and therefore provided that refund of such taxes should not be made unless it was shown that the manufacturers had borne the burden of the taxes. The purpose of Congress is frustrated if the rule of the statute is not applicable in judicial proceedings as well as in administrative proceedings.

The invoice system used by the respondent during part of the taxable period indicates that the respondent's purchasers bore the burden of the taxes. The fact that the respondent did not increase the catalogue prices of its products does not show that the respondent bore the burden of the taxes. The respondent has failed to comply with the statute requiring it to prove that it is entitled to recover such taxes.

II

Section 424 (a) (2) requires that it be "established to the satisfaction of the Commissioner" that the manufacturer bore the burden of the tax before refund may be made. A satisfactory interpretation of the meaning of those words, unless they are to be ignored entirely, seems to require the

conclusion that Congress intended to place the making of these particular refunds within the discretion of the Commissioner.

III

The ultimate finding of the court below that the respondent's ignition coils were not primarily adapted or specially designed for use on automobiles is in effect a conclusion that the coils were not parts or accessories within the meaning of the taxing statutes. The finding is not supported by other facts found. The court omitted to find facts in regard to the manner in which the respondent advertised its products. The Government contends that this constituted a material omission and that the case should be remanded for corrected and additional findings of fact.

If it be ultimately determined that the respondent's ignition coils were properly taxable, refunds already made on the ground that such coils were not taxable may be recovered by the United States in the amount of the counterclaim interposed in the court below.

ARGUMENT

I

IN ORDER TO RECOVER IN THIS ACTION THE RESPONDENT WAS REQUIRED TO PROVE THAT IT HAD BORNE THE BURDEN OF THE TAX

Section 424(a)(2) of the Revenue Act of 1928 (*infra*, pp. 27–28), forbids the refund of automobile parts or accessories taxes to a manufacturer unless

it is established to the satisfaction of the Commissioner "that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; * * *".[2] We contend that the respondent was obliged in this action to make the showing required by Section 424(a)(2) and that the respondent failed to do so.

After having prohibited refunds of automobile accessories taxes except upon conditions admittedly difficult to comply with (Act of February 28, 1927, c. 226, 44 Stat. 1250, 1254)[3] and after having made a study of the situation Congress enacted Section 424 of the 1928 Act. See House Report No. 2, 70th Congress, First Session, p. 27. As shown by that report the Ways and Means Committee believed that these excise taxes were generally passed on to the consumers and that the manufacturers were in most cases nothing but collecting agencies. The

[2] Section 424 prescribes three other conditions upon which such refunds may be made: if pursuant to a judgment of a court in a suit instituted prior to April 30, 1928, or if the amount was an overpayment of tax on an article properly taxable or if the manufacturer has filed a bond to repay such portion of the refund as is not distributed to the purchasers of the articles. The facts presented do not bring the respondent within any of these conditions.

[3] The provision was continued in the Act of December 22, 1927, c. 5, 45 Stat. 2, 30, and in the Act of March 3, 1928, c. 126, 45 Stat. 162, 169. The provision required a bond by the manufacturer, etc., and affidavits of the purchasers, and is very similar to what is now subsection (a) (3) of Section 424 of the 1928 Revenue Act.

report shows clearly that it was the purpose of Congress to allow no refund when the result would be to enrich manufacturers who had not borne the burden of the tax. There is no disagreement among the courts that such was the purpose of Congress. *Boyle Valve Co.* v. *United States,* 69 C. Cls. 129, 134; *Routzahn* v. *Willard Storage Battery Co.,* 65 F. (2d) 89, 93 (C.C.A. 6th), now pending on certiorari, No. 329, present term; *Electric Storage Battery Co.* v. *McCaughn,* 52 F. (2d) 205, 209 (E.D.Pa.), affirmed, *McCaughn* v. *Electric Storage Battery Co.,* 63 F. (2d) 715 (C.C.A. 3d); *American Chain Co.* v. *Eaton,* 58 F. (2d) 248, 255 (D.Conn.), reversed on other grounds, *Eaton* v. *American Chain Co.,* 63 F. (2d) 783 (C.C.A. 2d), now pending on certiorari, No. 196, present term.

The court below gave judgment for the respondent solely on the ground that the ignition coils manufactured and sold by the respondent were not primarily adapted or specially designed for automobiles within the meaning of the taxing statute. In so doing we contend that the court below either disregarded Section 424(a)(2) or was of the opinion that the proof in this case met the requirement of that section.[4] In either case we think the court

[4] The court's decision overruling the Government's demurrer (R. 12–14) did not pass upon the question now under discussion, for the demurrer admitted the allegation in the petition that the respondent had borne the burden of the tax (R. 5). The ruling on the demurrer was made on the authority of *Boyle Valve Co.* v. *United States,* 69 C.Cls.

below erred and that the intent of Congress in enacting Section 424 has not been fulfilled.

In our opinion, the purpose of the statute is wholly defeated if the rule laid down by it is held to be applicable only in administrative proceedings and not in judicial proceedings. Congress intended to prohibit refunds unless the manufacturer had borne the burden of the tax, and the intention is so manifest that we think the words "established to the satisfaction of the Commissioner" in the statute cannot justifiably be used to support a construction limiting the application of the statute to administrative proceedings.[5] The question whether another section of the Revenue Act of 1928, prohibiting refunds upon certain conditions, was limited in its application to administrative action was before this Court in *Graham & Foster* v. *Goodcell*, 282 U.S. 409. It was there contended that Section

129, which was also a decision upon demurrer. But in the *Boyle Valve* case (p. 133) the court seems to have recognized that the taxpayer must "establish to the satisfaction of the court whether he is entitled to a refund under the terms of the act."

[5] If the words "established to the satisfaction of the Commissioner" are to be given particular significance beyond an indication that Congress intended to require strict proof, or, if the words were intended to change in any way the normal method of refunding taxes in these particular circumstances, it seems more reasonable to interpret the words as placing these particular refunds within the discretion of the Commissioner subject to judicial review only in case of abuse of that discretion. The authorities upon this interpretation of Section 424 (a) (2) are set out in Point II of this brief, *infra*, pp. 17–21.

611 of the 1928 Act (c. 852, 45 Stat. 791, 875), providing in effect that taxes paid after the period of limitation should not be refunded where a claim in abatement was filed and collection stayed, did not apply to judicial proceedings. But this Court said, at page 424:

> We are brought back to the fundamental purpose of the statute, and we are unable to conclude that it established one rule for the Department and another for the courts. We think that it was intended to prevent refunds in the circumstances stated and not merely a particular way of getting the money from the Treasury; that the effect of the provision was to deny a right to recover the amount paid and that the provision governs equally wherever the right is asserted.

That reasoning and conclusion, we submit, are applicable here.

In *American Chain Co.* v. *Eaton, supra,* the District Court applied the requirement of the statute in the suit before it but concluded that the plainiff had satisfactorily shown that it had returned the tax to its customers. 58 F. (2d) 249. While we do not agree with the District Court's conclusion as to the sufficiency of the plaintiff's showing in that case, we do think the court was correct in noticing the relevancy of plaintiff's proof that it had borne the burden of the tax. In *Routzahn* v. *Willard Storage Battery Co., supra,* the Circuit Court of Appeals for the Sixth Circuit indicated that after a taxpayer had secured a judgment

against the Collector, no refund could be obtained until the Commissioner had been satisfied that the taxpayer had borne the burden of the tax. The decision recognizes that a taxpayer must submit the proof required by Section 424(a)(2), but in effect concludes that the judgment of the court need not be paid by the Commissioner unless he is satisfied as to the incidence of the tax. The implications of that holding are discussed in Point II of this brief, *infra*, pp. 17–21. In *McCaughn* v. *Electric Storage Battery Co., supra,* the Circuit Court of Appeals for the Third Circuit said that Section 424 "does not purport to contain any provision prescribing conditions under which taxes may be collected by means of a suit". 63 F. (2d) 715, 718. This, we contend, for the reasons above stated, was an erroneous conclusion.[6]

We submit, therefore, that the furtherance of the purpose of Congress in enacting Section 424 demands that the respondent show that the tax was not collected from its purchasers or that, if so collected, it was returned to them, and that if the court below intended to overrule *sub silentio* this contention on the part of the Government, it was in error and the decision should be reversed.

[6] The practical effect of the *Electric Storage Battery* case is the same as that of the *Willard Storage Battery* case for we are advised that the Treasury has withheld payment of the judgment in the *Electric Storage Battery* case and has requested the taxpayer to comply with the provisions of Section 424.

If the decision of the court below was intended to imply that the respondent had submitted proof which satisfactorily fulfilled the requirement of Section 424, we think there was error. The court below did not find specifically whether the taxes in question had been collected directly or indirectly from the respondent's customers or whether, if so collected, they had been returned to them. If we are correct in our contention that the respondent was compelled to make such a showing as a basis for recovery, the court below should have made an ultimate finding of fact with respect to it. *United States* v. *Wells,* 283 U.S. 102. The absence of such an ultimate finding will not defeat recovery if the finding follows from other facts found as a necessary inference and results as a conclusion of law. *Botany Mills* v. *United States,* 278 U.S. 282, 290. But we contend that no such case is presented here and that the facts as found will not support an ultimate finding that the respondent bore the burden of the tax.

The most apposite finding on the subject is, that during the period from May 19, 1923, to December 29, 1925, it was respondent's practice to note on its invoices to customers that 1/21 (or 1/41) of the charge for the article was for excise tax, and that 20/21 (or 40/41) indicated the purchase price. (R. 18.) This finding clearly indicates that the respondent's purchasers paid the tax; the invoices amount to a representation by the respondent that

the price charged included a charge for the tax.[7] But the respondent claims that other findings of the court below establish that the tax was not collected from the respondent's purchasers. These findings are that the respondent did not increase its catalogue prices during the taxable period, did not add thereto any amounts representing the excise taxes, and did not collect any amount from its purchasers in addition to the catalogue prices. (R. 18.) In such circumstances the District Court in *American Chain Co.* v. *Eaton, supra,* thought that the invoice method such as used here required a conclusion that the tax was collected from the purchaser, but that the effect of the manufacturer's not increasing the total charge was to return the tax to the purchaser. 58 F. (2d) 249. We cannot agree that the failure to raise the catalogue price results in a return of the tax to the purchaser. So many factors enter into the establishment of the price at which an article may be profitably marketed that we think the fact that the total charged to the customer remains stationary is not necessarily an indication of where the burden of an excise tax is falling.[8] The burden was upon the respondent

[7] By instituting this method of paying the tax the respondent was able to reduce the amount payable, since the tax would, under this arrangement, be computed upon an amount less than the total charge to the purchaser. See Regulations 47 (1921 ed.), Article 3. Compare *Lash's Products Co.* v. *United States*, 278 U.S. 175.

[8] There is, for example, nothing in the record to show whether changes in the cost of manufacturing (with all the

to show that the weight of the tax fell upon it. The finding that the respondent did not increase the charge to purchasers is negative only, in that it shows that the respondent did not add to the charge an amount for the tax computed upon the price for which the article was formerly sold. If there were also a finding that the respondent paid a tax computed upon the unchanged charge to purchasers, the Government might offer no objection to the sufficiency of the proof. But in the absence of such a showing and in the presence of a finding that the respondent invoiced the tax as a separate item of the charge to purchasers we contend that the respondent has failed to sustain the burden placed upon it by Section 424 (a) (2) to prove that the tax was not collected from its purchasers.

There is also a failure of proof in another respect if our contention concerning the conclusion to be drawn from the invoice arrangement is correct. The respondent seeks refunds for the period from April, 1923, through February, 1926. (R. 17–18.) The invoicing method was used from May 19, 1923, to December 29, 1925, leaving a period at the beginning and at the end not controlled by any conclusion

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items therein included) affected the price charged for respondent's articles. Again, competition or other market conditions may have been responsible for the failure to increase prices to the purchaser.

to be drawn from the invoice system. (R. 18.) But the court below has found that it is not possible to determine the amount of tax paid for the period when the invoice plan was used (R. 18), and, therefore, it follows that no recovery may be had for separate periods for lack of proof of the amounts involved. Furthermore, it does not appear what respondent's practice was after December, 1925 (R. 18), and we submit that there is a total failure of proof for the period from December 29, 1925 to the end of February, 1926, both as to whether the respondent bore the burden of the tax and as to the amount thereof.

II

SECTION 424(A)(2) PLACED THE MAKING OF REFUNDS THEREUNDER WITHIN THE DISCRETION OF THE COMMISSIONER OF INTERNAL REVENUE, AND HIS DETERMINATION IS NOT REVIEWABLE IN THE COURTS

The Commissioner of Internal Revenue refused to refund the amounts now sued for by the respondent on the ground that such amounts represented taxes that had been passed on to the respondent's customers and had not been returned to them. (R. 17.) The question of the jurisdiction of the courts to review the decision of the Commissioner with respect to refund claims under Section 424(a)(2), and to give judgment for such refunds has been presented to several of the lower Federal courts. The contention of the Government in such cases has been that Section 424(a)(2) placed the refund-

ing of automobile accessories taxes within the discretion of the Commissioner, and that the words "established to the satisfaction of the Commissioner" lead only to that conclusion, unless they are to be disregarded entirely. It was clearly competent for Congress to provide that it should be within the discretion of the Commissioner of Internal Revenue to make these refunds. Cf. *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551. While there are not here so many considerations arising from the nature of the matters submitted by the statute for determination as led to the result reached in the *Williamsport Wire Rope Co.* case, yet, we think, the interpretation of Section 424(a)(2) consistently contended for by the Government in the lower courts is the correct one.

This question has been decided adversely to the contentions of the Government in *McCaughn* v. *Electric Storage Battery Co.*, *supra*, in *Boyle Valve Co.* v. *United States*, *supra*, by the District Court in *American Chain Co.* v. *Eaton*, *supra*,[9] and in the case at bar. In two District Court cases the decisions have been favorable to the Government. *Twentieth Century Manufacturing Co.* v. *Hopkins* (N.D. Texas), reported in X-2 Cumulative Bulletin 408; *Sterling Spring Co.* v. *Routzahh* (N.D. Ohio), reported in VIII-2 Cumulative Bulletin 358. The same view is expressed by the dissenting opinion

[9] The Circuit Court of Appeals reversed on the merits of the taxability of the articles, and did not pass on this question.

in *McCaughn* v. *Electric Storage Battery Co.*, *supra*, 63 F. (2d) 718.

In *Routzahn* v. *Willard Storage Battery Co.*, *supra*, the Circuit Court of Appeals for the Sixth Circuit has held that the court may give judgment based upon a ruling that the articles involved were not properly taxed, but that the taxpayer must thereafter satisfy the Commissioner that it bore the burden of the tax as required by Section 424 (a)(2). Thus the court has construed the statute as authorizing the Commissioner to render the court's judgment ineffective by his determination that the taxpayer fails to satisfy the proof required in the statute. The opinion appears to deny the jurisdiction of the court to review the decision of the Commissioner except, perhaps, in cases of arbitrary or capricious action. But at the same time the decision casts doubt upon the jurisdiction of the court to render any judgment at all, for it is settled that no case or controversy under the Constitution is presented where Congress or an administrative officer has authority to refuse payment of the judgment of a Federal court, or where the parties are not concluded by the judgment. *Gordon* v. *United States*, 2 Wall. 561; *In re Sanborn*, 148 U.S. 222; *Hayburn's case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 39. Furthermore, in the *Willard Storage Battery Co.* case the taxpayer brought suit in the District Court without ever having attempted to satisfy the Commissioner that

it had not passed the tax on to the purchasers. Whether or not the Commissioner's determination of that question is subject to judicial review, it seems to us that Section 424(a)(2) should be interpreted as requiring the taxpayer to go before the Commissioner and to obtain a determination by the Commissioner prior to suing in court. Better practice thereby would result, for all justiciable questions with respect to the requested refunds would be properly before the court for decision. If the Commissioner's determination under Section 424(a)(2) cannot be reviewed at the instance of the taxpayer except for abuse of discretion, then a court decision upon the merits of the legality of the tax would be unnecessary, no abuse of discretion appearing. If the Commissioner's determination may be reviewed by the courts, both the legality of the tax and the right to a refund under Section 424(a)(2) could be determined at the same time and the judgment of the court would settle all rights involved.

While we do not urge that the matters to be determined under Section 424 (a) (2) are peculiarly questions of administrative discretion (see *Williamsport Wire Rope Co.* v. *United States, supra,* p. 559), yet we think that no interpretation of the intent of the section so satisfactorily explains the particular reference to the Commissioner as the one which places the making of these refunds within his discretion. The familiar rule of statutory con-

struction that effect should be given to every clause and part of a statute requires that significance be attached to the words "established to the satisfaction of the Commissioner." *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208; *United States* v. *Lexington Mill Co.*, 232 U.S. 399, 410.[10] We submit, therefore, that those words were intended to prevent the refunding of automobile accessories taxes unless the manufacturer first satisfied the Commissioner that it had not passed the taxes on to the purchasers or had ultimately borne the burden of the taxes, and that the Commissioner was designated as the sole arbiter of that question unless his determination was shown to be arbitrary or capricious.

III

IF THE RESPONDENT IS ENTITLED TO BRING THIS ACTION, AND IF THE RESPONDENT HAS SATISFIED THE REQUIREMENT OF SECTION 424 OF THE REVENUE ACT OF 1928, THE CASE SHOULD BE REMANDED TO THE COURT BELOW FOR CORRECTED AND ADDITIONAL FINDINGS OF FACT

The court below found that the respondent's ignition coils were equally adapted to marine, automotive, truck, motorcycle or airplane engines, and to outboard motors and engines for concrete mixers, and were not primarily adapted or specially

[10] There has been some judicial discussion of the report of the Committee on Ways and Means with respect to Section 424. While we do not think that the report is helpful on the question whether it was intended that the Commissioner's determination was to be conclusive, for the information of the Court that part of the report referring to Section 424 is printed in Appendix B (*infra*, pp. 29–30).

designed for use as a component of automobiles, motorcycles, automobile trucks, or automobile wagons. (R. 19.) There is no doubt that it was proper for the court to make an ultimate finding of fact on that subject. *United States* v. *Wells*, 283 U.S. 102. But it is clear that the court's finding was drafted to state a conclusion based upon the legal definition of parts and accessories laid down by this Court in *Universal Battery Co.* v. *United States*, 281 U.S. 580, 584, "that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles." It is obvious that an ultimate finding so framed states in effect that respondent's products are not within the definition of parts and accessories as this Court has construed the statutes and regulations. Thus, the only issue, legal or otherwise, involved in this branch of the case is answered by the court's finding. While we concede that it is generally not necessary for the Court of Claims to support its findings by setting out the underlying circumstantial facts, yet we contend that in such a case as this, where the ultimate finding concludes the parties on the only legal issue present, better practice would require an exposition of the facts upon which the ultimate conclusion rests. Here the ultimate finding appears to stand isolated and unsupported by any other facts the court has found. There was, however, evidence before the court appearing in the report of the Commissioner of the Court of Claims

that the respondent advertised its ignition coils as being primarily adapted for use in automobiles. The Commissioner's report in this respect is set out in Appendix C (*infra*, pp. 31–32). We maintain that if the advertising material were included in the court's findings, the Government would be able to contend successfully that the ultimate finding referred to above is inconsistent with other facts found, and thus establish a case for remand for corrected findings. See *Luckenbach S.S. Co.* v. *United States*, 272 U.S. 533, 539. The Court of Claims has in other cases recognized the importance of advertising when determining whether particular articles are parts or accessories within the meaning of the taxing statutes. See *Cole Storage Battery Co.* v. *United States*, 65 C.Cls. 164, certiorari denied, 278 U.S. 641; *Perfection Gear Co.* v. *United States*, 70 C.Cls. 422; *Edison Storage Battery Co.* v. *United States*, 67 C.Cls. 543, 555. As the case now stands, the Government is precluded from making any legal objection to the judgment below because the court has neglected to include in its findings the facts upon which the conclusion that the articles are not taxable is based.[11] The case should, therefore, be

[11] The judgment of the court below cannot rest upon the finding that respondent's ignition coils were "equally adapted" for other uses (R. 19). That such a conclusion would be a misapplication of the rule of *Universal Battery Co.* v. *United States*, 281 U.S. 580, is argued fully in the Government's brief in *Routzahn* v. *Willard Storage Battery Co.*, No. 329, present term.

remanded for additional findings on the ground that the present findings are "silent in respect of a material matter." *Luckenbach S.S. Co.* v. *United States*, *supra*, p. 539.

The Government submitted a motion to this Court at the time the petition for certiorari was filed to remand the case to the Court of Claims for additional findings of fact. We submit that if this Court is of the opinion that respondent may bring this suit in spite of Section 424 of the Revenue Act of 1928, and has satisfied the requirement of that section, the case should be remanded to the Court of Claims for corrected and additional findings with respect to the manner in which the respondent advertised the articles taxed, in order that any legal question in regard to the application of the taxing statutes will be properly presented for decision.

In regard to the Government's counterclaim, the findings show that refunds were made to the respondent for the period beginning March, 1919, and ending in March, 1923, in the amount of $46,758.53, and for the month of April, 1923, in the amount of $768.76. (R. 17.) These refunds were made on the ground that the respondent's ignition coils were not taxable as parts or accessories. (R. 17.) If the Government is successful in establishing that the coils were properly taxable, the refunds will appear to have been erroneously made and may be

recovered by the United States. *Talcott* v. *United States*, 23 F. (2d) 897 (C.C.A. 9th), certiorari denied, 277 U.S. 604.

CONCLUSION

The respondent has failed to establish its right to recovery under Section 424 (a) (2) of the Revenue Act of 1928, and the decision should be reversed on that ground. The court below has found as a fact that the respondent's articles were not primarily adapted for use on automobiles (i.e., were not taxable) without finding other facts to support that conclusion and has failed to include in the findings certain material facts with respect to the respondent's advertising. The cause should be remanded for corrected and additional findings.

Respectfully submitted.

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NOVEMBER, 1933.

APPENDIX A

Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1122, provides in part as follows:

> That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased —
>
> (1) Automobile trucks and automobile wagons, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> (2) Other automobiles and motorcycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;
>
> (3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;
>
> * * * * *

The pertinent sections of the Revenue Acts of 1921 and 1924 are the same in so far as they relate to the issues of this case. Revenue Act of 1921, c. 136, Sec. 900, 42 Stat. 227, 291; Revenue Act of 1924, c. 234, Sec. 600, 43 Stat. 253, 322–323, (U.S.C., Title 26, Sec. 881).

The pertinent provisions of Regulations No. 47, promulgated May 1, 1919, are as follows:

ART. 15. Definition of parts.—A "part" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, and which is primarily adaptable only for use as a component part of such vehicle. Mere stock or commercial commodities such as bolts, nuts, washers, screws, though used as components for such vehicles, are not "parts" within the meaning of subsection (3) of section 900. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adaptable for use as component parts of such vehicles. Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adaptable for use as such a component part. * * *

The parts quoted of the above Regulations were continued without material changes in Revised Regulations issued under the Revenue Acts of 1921, and 1924. Reg. 47, Art. 15 (1921); Reg. 47, Art. 16 (1924).

Section 424 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 866 provides in part as follows:

SEC. 424. *Refund of Automobile Accessories Tax.*

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of

section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

* * * * *

APPENDIX B

The Committee on Ways and Means report on the Revenue Act of 1928 contained the following comment on Section 424 (House Report No. 2, 70th Cong., 1st Sess., p. 27):

REFUND OF AUTOMOBILE ACCESSORIES TAX

A provision was inserted in the First Deficiency Act of 1927 (which became law on February 28, 1927), prohibiting the refund of amounts paid as taxes upon the sale of automobile accessories, except upon conditions which, in many instances admittedly could not be complied with. The provision was purposely made all embracing, in order that improper refunds would not be made until your Committee was given an opportunity to make a study of the situation.

Generally speaking, it is believed that the amounts paid upon the sale of automobile accessories was collected from the purchaser and passed on directly to the consumer. Despite the fact that the tax is, in legal effect, a tax upon the manufacturer, it turned out that the manufacturer, in almost all cases, was but a collecting agency. The Committee does not believe that, as a general principle, the taxes paid upon such articles subsequently held to be not taxable should be refunded and thus unjustly enrich the manufacturers who merely collected the tax from the persons to whom they sold the articles.

However, there are some cases where refunds should properly be made. Accord-

ingly, section 424 of the new Bill provides that judgments of the court should be paid if the action was begun prior to the effective date of the Deficiency Act. It also provides that refunds may be made whenever the taxpayer can establish to the satisfaction of the Commissioner that the amount he paid was excessive (not by reason of the fact that the article was wrongly taxed but by reason of the fact that the tax was improperly computed); or that he did not pass the tax on (for example, where at the time of sale he did not know the article was taxed, or where he was called upon to pay an additional tax after the sale had been made); or that the tax was returned to the purchaser or a lessee (for example, where there was an adjustment in the selling price, in accordance with a prior agreement, such as cash discounts, quantity rebates, and wholesale bonuses, or where a sale was rescinded). In all other cases he must comply with conditions similar to those imposed by the proviso in the Deficiency Act and give a bond conditioned upon the refund of the tax to the ultimate consumer.

APPENDIX C

With respect to the respondent's advertising, the Commissioner reported to the Court of Claims as follows (pp. 2, 3): It [the respondent] did, however, manufacture and sell several types of ignition coils which it very generally advertised as:

> Genuine Jefferson automobile ignition coils interchangeable with any of the standard battery ignition systems.

The plaintiff further advertised:

> The Jefferson line of automobile ignition coils consists of only a few types, which offer an exact replacement for any of the coils used as standard equipment. The coils are sufficiently flexible through the use of interchangeable fittings, adjustable caps and terminals, to enable one type of coil to be used to replace many of the different coils now in general use.

During the period involved herein it published and distributed charts describing and illustrating its so-called "Jefferson automobile ignition coils" indicating which of its several models of coils could be used as replacements on practically all makes and models of automobiles, and further specifically designated which of its several types of coils should be used as replacements in connection with the various standard lighting and ignition systems. One of the coils illustrated and described was the "Jefferson emergency automobile ignition coil"

which is illustrated with four types of brackets for mounting. That coil is described as follows:

> The Jefferson emergency coil, with the three simple adapters supplied with it, makes it an interchangeable or replacement coil on all standard automobile ignition systems. A heavy duty condenser is built into the coil, which can be utilized in the ignition circuit or eliminated, as the particular replacement requires. For 12-volt systems a resistance unit is necessary.
>
> The installation is very simple. Complete instructions and coil specification list are furnished with each coil.

Another type illustrated and described is the "Jefferson universal automobile ignition coil" which is illustrated with four types of brackets and a resistance unit. That coil is described as follows:

> The Jefferson universal coil is designed for replacement on all standard battery ignition systems. It is the only ignition coil outfit which is universally adaptable to all standard battery ignition systems. The Jefferson universal coil represents the highest efficiency in coil construction. It is compact, dependable in performance, and very simple to install.

In one of its circulars captioned "Jefferson Automobile Ignition Coils" the replacement chart sheet carries the following heading:

> The last word in automobile ignition coils. Jefferson coils are the only 100 per cent complete line on the market, and consist of only a few standard types. Our trade-mark identifies genuine Jeffersons—get them from your jobber.

U. S. GOVERNMENT PRINTING OFFICE : 1933